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No. 05-1425

IN THE

Supreme Court of the United States

COOPER TIRE & RUBBER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Board's Brief in this case does not address the issues posed by the Petition for Writ of Certiorari, i.e., that the Board departed from its own precedent and failed to explain its two conflicting lines of authority. Instead, the Board offers three arguments on unrelated or extraneous issues. One raises an issue considered and rejected by the Sixth Circuit Court of Appeals, i.e., that Cooper did not raise before the Board the issue it argues on appeal. The second two arguments attempt to distinguish the facts in *Cooper* by providing *post hoc* rationalizations for the Board's decision in this case.

The first argument was raised, considered and rejected by the Sixth Circuit which considered and ruled upon Cooper's arguments on the merits of the issue posed by Petitioner before this Court, i.e., the Board's two conflicting lines of authority where a single threat to eliminate benefits is unaccompanied by other objectionable conduct.

The second two arguments contain *post hoc* rationalizations for the Board's action in this case and may not be considered by the Court. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 85 S. Ct. 1061, 13 L. Ed. 2d 951 (1965). One argument suggests that a "bargaining from scratch" threat regarding multiple benefits was "a materially different kind of alleged threat" than a comparable threat involving only a single benefit as in *Cooper*. Such an attempt to distinguish *Cooper* from the other "bargaining from scratch" cases is not to be found in the Board's decision. The Board's second argument in its brief suffers from the same defect, i.e., its suggestion that whether a benefit had vested *prior* to the election distinguished the facts in *Cooper* from other "bargaining from scratch" cases. That also is nowhere to be found in the Board's decision.

The raising by the Board of three such weak arguments, of course, avoids addressing the merits of the issue posed by the Petition: The incompatibility between the Board's decisions in *Shaw's Supermarkets, Inc. v. NLRB.*, 884 F.2d 34 (1st Cir. 1989); *Exxon Research and Eng'g Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996); *Cooper*; and *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. 188 (2000), on the one hand, and the conflicting line of precedent in the eight NLRB cases analyzed by the First Circuit in *Shaw's Supermarkets*.

II. THE SIXTH CIRCUIT REJECTED THE BOARD'S ARGUMENT THAT COOPER DID NOT RAISE BEFORE THE BOARD THE ISSUE THAT THE DIRECTION OF A SECOND ELECTION BASED UPON A SINGLE IMPLIED THREAT WITH NO OTHER OBJECTIONABLE CONDUCT WAS INCONSISTENT WITH BOARD PRECEDENT

The Board raised before the Sixth Circuit the same argument that it does in this Court, i.e., that Cooper "failed to make that argument to the Board". That is not true. A review of the record demonstrates that Cooper, at each stage of the proceedings below, pointed out to the Board that the direction of a second election based upon a single, implied threat was not consistent with existing Board precedent.

The only thing that Cooper did not do before the Board was to tell the Board that it had departed from its own precedent. But Cooper, lacking clairvoyance, could *not* make that argument to the Board until the Board actually departed from its own precedent. Until that time, Cooper did all it could. It pointed out the correct precedent to the Board and asked the Board to follow it.

The Hearing Officer based his Recommendation directing a second election in this case on *Georgia-Pacific Corp.*, 325 NLRB 867 (1998) and *Advo Systems, Inc.*, 297 NLRB 926 (1990). (Hearing Officer's Report and Recommendation, at p. 7-8, Apx. p. 0129-30). Cooper, in its Exceptions to the Hearing Officer's Report filed on March 31, 2003, directly addressed the Hearing Officer's misuse of these precedents. Cooper pointed out that whereas *Georgia-Pacific* and *Advo Systems* involved explicit threats, the Hearing Officer recommended a second election based only upon an alleged implied threat in this case. (Exceptions to Hearing Officer's Report, p. 13 n.5 and p. 14 n.6, Apx. p. 0152, 0153).

In the Board's October 28, 2003 Decision affirming the Hearing Officer's Recommendation, Members Liebman and Walsh cited *Georgia-Pacific* and *Advo Systems* yet again in adopting the Hearing Officer's Recommendation for a second election. In addition, they cited *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (May 23, 2003), which had not been decided at the time Cooper filed its Exceptions, in support of their decision. (10/28/03 NLRB Decision, p. 2, Apx. p. 0008).

Cooper, in the Introduction to its final Brief to the Board below, expressly invited the Board to reconsider its earlier decision because "Chairman Battista had it right and Members Liebman and Walsh had it wrong" in the first Decision directing a Second Election. (Cooper's Brief in Opposition to the General Counsel's Motion for Summary Judgment, p. 1-2, Apx. p. 0194-5). In the body of the brief, Cooper again pointed out that one of the errors committed by the Board was finding Q&A #22 objectionable based upon the explicit threats at issue in *Georgia-Pacific*, *Advo Systems*, and *Yuma Coco-Cola Bottling*. Cooper expressly distinguished each of these cases again on the basis that Q&A #22 was alleged to be only a single, implied threat

rather than an explicit threat to eliminate a benefit. (*Id.* at p. 15 n.8 (*Georgia-Pacific*), Apx. p. 0208; p. 16 n.9 (*Advo Systems*), Apx. p. 0209; p. 20 (*Yuma Coca-Cola Bottling*), Apx. p. 0213).

Moreover, the Board specifically relied upon *Plastronics*, 233 NLRB 155 (1997) in rendering its decision in *Cooper*. That case involved multiple explicit threats to eliminate wages and benefits as compared to the single implied threat in both *Shaw's Supermarket* and *Cooper*. Cooper specifically distinguished *Plastronics* from the fact situation in its case before the Board on this ground.

Accordingly, Cooper pointed out the Board's departure from precedent at each stage of the proceedings below. That Cooper did so by distinguishing the instant case from established precedent addressing threats to eliminate an existing benefit does not mean that Cooper failed to argue that the NLRB "depart[ed] from precedent." Put simply, the Board could not be said to have departed from precedent until it, in fact, did so. To argue that Cooper should have specifically raised the Board's departure from precedent as a separate argument (rather than simply distinguishing the instant case from existing Board precedent involving threats to eliminate existing benefits) is to assume, wrongly, that the concerns of the Board and appellate courts are the same.

In fact, the principle that an agency explain the basis for departing from its own precedent emanates from the *courts* reviewing the agency's decisions, not the agency. This is because the rationale behind this principle is to permit the reviewing court to understand the basis of the agency's action and judge the consistency of that action with the agency's mandate. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita*

Board of Trade, 412 U.S. 800, 808-09 (1973). It would not have made sense, therefore, for Cooper to argue *before the Board* that the Board's departure from precedent warranted reversal of its decision directing a second election on the basis that a reviewing court would not be able to understand the basis for the Board ruling otherwise.

Structuring Cooper's argument in this manner, rather than simply distinguishing this case from the relevant precedent, could only be done in the context of raising this issue before an appellate court. Which is what Cooper did. Indeed, a review of the Sixth Circuit's decision in this case shows that the Court of Appeals considered on the merits Cooper's argument that the Board had departed from its own precedent like it had done in *Shaw's Supermarket* (Apx. p. 9A-12A).

III. APPELLATE COUNSEL'S *POST HOC* RATIONALIZATIONS FOR THE BOARD'S DECISION MAY NOT BE CONSIDERED

This Court held in *NLRB v. Metropolitan Life Insurance Co.* that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action" 380 U.S. at 444, citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962). As the Court held, "[f]or reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process . . ." *Metropolitan*, 380 U.S. at 444.

Appellate counsel for the Board has advanced two *post hoc* rationalizations for the Board's decision which were not contained in the reasons and findings by the Board.

First, the Board's appellate counsel suggests that a single implicit "bargaining from scratch" threat to eliminate all existing benefits in *Shaw's Supermarket* was materially different from a single implicit "bargaining from scratch" threat to eliminate one existing benefit in *Cooper*.

But the Board never made such a distinction in its decision. Indeed, the Board specifically relied on *Plastronics*, 233 NLRB 155 (1997) which involved multiple, explicit "bargaining from scratch" threats to eliminate all existing benefits. It made no effort to distinguish the fact situation in *Plastronics* from the facts in *Cooper*, which involved one implicit "bargaining from scratch" threat to eliminate a single benefit.

Second, appellate counsel argues that the benefit Cooper allegedly threatened to eliminate was already vested and that this distinguishes *Cooper* from *Shaw's Supermarket*. Yet the Board made no reference to a "vested" benefit which the employees had already earned as a relevant factor in its decision. To the contrary, the Hearing Officer's opinion, adopted by the Board, specifically held that: "to a reasonable employee, the 2002 bonus was still a *future* bonus, because it had not been paid yet." (Appendix C, pg. 36A.) (Emphasis added.)

The plain fact is that an implied "bargaining from scratch" threat to eliminate all existing benefits as in *Shaw's Supermarket* does not involve "a materially different kind of alleged threat" from an implied threat to eliminate a single benefit (as in *Cooper*) like the Board claims in its Brief. (Page 9.) It is simply not true, as the Board claims in its Brief at page 11, that "unlike any of the cases on which Petitioner relies, this case involves no statement to the effect that

bargaining would begin from scratch." Threatening to take away a benefit to be paid in the future is, by definition, a threat to "bargain from scratch", i.e., it will not be paid unless the Company agrees with the Union to do so.

IV. THE BOARD CONTINUES TO AVOID EXPLAINING WHY THE FIRST CIRCUIT'S ANALYSIS IN *SHAW'S SUPERMARKET* IS INCORRECT

The Board continues to evade the analysis articulated by the First Circuit in *Shaw's Supermarket*. Indeed, the Board continues to consider its own decision in *Shaw's Supermarket* to be good law as exemplified by its decision in *Exxon Research*, 89 F.3d 228 (5th Cir. 1996), its reaffirmation of those two decisions in *Noah's Bay Area Bagels*, 331 N.L.R.B. 188 (2000), and its decision in *Cooper*. None of those cases suggest that a single implied threat to eliminate a single benefit is "a materially different kind of alleged threat than an implied threat to eliminate all existing benefits." The fact is that in *Shaw's Supermarket* as in *Exxon* and in *Cooper*, the single implied threat to eliminate one or more benefits was unaccompanied by any other objectionable conduct and that is a material departure from the eight cases analyzed by the First Circuit in *Shaw's Supermarket*. The NLRB resolutely continues to refuse to explain why it did so. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973) was intended to prevent this.

How long will the NLRB continue to evade the question posed by the First Circuit in *Shaw's Supermarkets*, i.e., that, prior to 1989, NLRB precedent was clear that a single implied threat to eliminate benefits made during a Union election

campaign, unaccompanied by other unlawful conduct, was not unlawful or sufficient to overturn the results of an election? The Board in its Brief to this Court does not dispute that the fact situation in *Cooper* involved an implied threat to eliminate an existing benefit with no other objectionable conduct. This was the issue addressed by the First Circuit in *Shaw's Supermarket* when it analyzed the conflicting lines of authority.

The very cases cited by the NLRB in its decision in *Cooper* directing a Second Election all involved either multiple threats to eliminate benefits or a single threat accompanied by other objectionable conduct. *Hertz Corp.*, 316 NLRB 672 (1995) (threat with other objectionable conduct); *Advo Systems, Inc.*, 297 NLRB 926 (1990) (threat with other conduct); *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (2003) (direct threat followed by multiple implied threats); *Plastronics*, 233 NLRB 155 (1997) (multiple unequivocal threats); *Georgia-Pacific Corp.*, 325 NLRB 867 (1998) (multiple unequivocal threats).

The eight cases analyzed in *Shaw's Supermarket* are in direct contrast to the cases cited in the preceding paragraph. As in *Shaw's Supermarket*, *Exxon Research*, and *Cooper*, those eight cases all involved single implied threats to eliminate existing benefits unaccompanied by any other objectionable conduct. *Atchison* requires the Board to explain these conflicting lines of authority. It should. In the words of the Fifth Circuit in *NLRB v. International Union of Operating Engineers, Local 925*, 460 F.2d, 589, 604 (5th Cir. 1972), "An inadequately explained departure solely for purposes of a particular case, or the creation of conflicting lines of precedence in governing the identical situation, is not to be tolerated".

CONCLUSION

For these reasons, Cooper respectfully requests that its Petition be granted.

Respectfully submitted,

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